

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,799

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Appeal of)

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INTRODUCTION

The petitioners appeal the decision by the Department of Social and Rehabilitation Services (SRS) finding them ineligible for an ongoing adoption assistance subsidy and for reimbursement of adoption expenses related to their adoption of a child in 1991. The issue is whether the petitioners' child qualifies retroactively for such assistance.

FINDINGS OF FACT

In 1991, the petitioners arranged with an international adoption agency based in Massachusetts, but also licensed in Vermont, to adopt a young girl who had been born in Moscow, Russia, on February 19, 1988, and who at that time was a ward of the Russian government. The child came to live with the petitioners in October, 1991. The Russian adoption was finalized in July, 1992, and the child has resided with the petitioners ever since. The entire adoption was handled by the private adoption agency. SRS was not involved in the adoption in any way.

Although there is conflicting evidence as to how much about the child's medical condition was known to the petitioners at the time of the adoption, it appears that the petitioners knew that the child's mother was an alcoholic and that the child had speech delays and vision problems. At the time of the adoption the petitioners agreed in writing to assume all the medical costs of the child, including any that were unforeseen.

It appears that the petitioners were not informed by the adoption agency of the existence of the adoption assistance program. A recent letter from the head of the adoption agency states that the petitioner's caseworker at the agency did not inform the petitioners of the adoption assistance program, and that the petitioners' caseworker is no longer working at the agency. SRS introduced uncontroverted evidence that on at least three separate occasions between January, 1991, and February, 1992, it provided the adoption agency with written information regarding the availability of adoption assistance for private adoptions.

Unfortunately, the adopted child's medical problems turned out to be more severe and costly than the petitioners had anticipated. In 1995, through an adoption services newsletter, the petitioners learned of the existence of the adoption assistance program. The petitioners applied to SRS for this assistance for their daughter on June 26, 1995. In a letter dated June 30, 1995, SRS denied the application because it wasn't made prior to the petitioners' adoption of their daughter.

ORDER

SRS's decision is affirmed.

REASONS

The starting point for the legal analysis in this matter is the federal statute that created the adoption assistance program. 42 U.S.C. § 673 includes the following:

Adoption assistance program

(a) Agreements with adoptive parents of children with special needs; State payments; qualifying children; amount of payments; changes in circumstances; placement period prior to adoption; nonrecurring adoption expenses

. . .

(2) ... a child meets the requirements of this paragraph if such child--

(A)(i) at the time adoption proceedings were initiated, met the requirements of (AFDC eligibility) or would have met such requirements except for his removal from the home of a relative . . . either pursuant to a voluntary placement agreement with respect to which Federal payments are provided . . . or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child,

(ii) meets all of the requirements of subchapter XVI of this chapter with respect to eligibility for supplemental security income benefits, or

(iii) is a child whose costs in a foster family home or child care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent

(B)(i) received aid under the State plan (for AFDC) in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(ii)(I) would have received such aid in or for such month if application had been made therefor, or (II) had been living with a relative . . . within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made, or

(iii) is a child described in subparagraph (A)(ii) or (A)(iii), and

(C) has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs.

. . .

(c) Children with special needs

For purposes of this section, a child shall not be considered a child with special needs unless--

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter, and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

The above criteria can be summarized as requiring that to be eligible for adoption assistance a child must 1) be either ANFC or SSI eligible at the time the adoption proceedings are initiated; 2) be receiving or eligible for ANFC at the time of the adoption assistance agreement or the court proceedings removing the child from the home; and 3) have "special needs"--i.e., cannot return to live with its parents, have a medical or situational handicap, and because of that handicap cannot be placed for adoption without providing adoption assistance payments.

Federal regulations implementing the above provisions further provide:

The adoption assistance agreement for payments pursuant to section 473(a)(2) must meet the requirements of section 475(3) of the Act and must:

(1) Be signed and in effect at the time of or prior to the final decree of adoption. A copy of the signed agreement must be given to each party

42 C.F.R. § 1356.40 (b).

The petitioners maintain that they should be found eligible for an adoption assistance subsidy at this time because it can now be determined retroactively that their child would have met all the above eligibility factors for adoption assistance had they applied for it at the time. Although acknowledging sympathy with the petitioners' situation, SRS maintains that it is not the intent of the program to provide assistance to adopting parents who, after the adoption takes place, are faced with expenses and circumstances they did not understand or anticipate. The hearing officer concludes that the evidence and the law in this matter clearly support SRS's decision.

The legal analysis need really go no further than the regulation cited above, 42 C.F.R. § 1356.40 (b)(1), which requires that to be eligible for the adoption assistance program an adoption assistance agreement between SRS and the adopting parents "must...be signed and in effect at the time of or prior to the final decree of adoption". There is no question in this matter that the petitioners did not even apply for adoption assistance until almost three years after they had adopted the child.

The petitioners cite two U. S. Department of Health and Human Services (HHS) Policy Interpretation Question Memoranda (PIQ) to support their claim that adoption assistance can be awarded in "extenuating circumstances" after an adoption is final. Neither of the PIQ's referred to, however, is deemed to be at all analogous to the petitioners' situation herein. Both cases concern situations in which the state agency (SRS's counterpart) failed to inform the parents of either the existence of or all the eligibility criteria for the adoption assistance program. The "extenuating circumstances" referred to in these PIQ Memoranda were the agencies having failed to inform the parents, or misinforming them, about the adoption assistance program. (See also, Calmer v. Ohio Dept. of Human Services, et al, Case No. 188051 [Ohio Court of Common Pleas, 1991].)

In this case, it was the private adoption agency that failed to inform the petitioners of the existence of the adoption assistance program, even though SRS had informed the adoption agency of the program. The Board has held that the elements of estoppel are not met, and a state agency cannot be estopped, when individual's detrimental reliance is based not on the actions or inactions of the party to be estopped, but rather on the actions or inactions of a third party. Fair Hearing No. 13,029; see also, Stevens v. DSW, 159 Vt 408 (1992).

The above regulation clearly requires that to be eligible for adoption assistance payments an adoption assistance agreement has to be signed and in effect at the time of or prior to the adoption itself. In this case, through no fault of SRS, this simply was not done. Inasmuch as SRS's decision in this matter was in accord with the regulations, the Board is bound by law to affirm it. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 19.

In light of the above conclusion it is unnecessary for the Board to consider whether the child can retroactively be found to have met the other eligibility provisions in the federal statutes (see supra). It can be noted, however, that the petitioners, inter alia, would face a daunting task to establish that the child had "special needs" within the meaning of the federal statute--i.e., that an effort to place her for adoption without adoption assistance would have been unsuccessful (see 42 U.S.C. § 673(c)(2), supra). The fact that the petitioners, themselves, adopted the child without this assistance weighs heavily, if not conclusively, against a retroactive finding that the child had "special needs" in this regard. ⁽¹⁾

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1. Unlike the petitioners in Fair Hearing No. 13,474, also pending before the Board at this time, the petitioners herein do not allege that they were, in effect, defrauded by the adoption agency into adopting their child, or that any information regarding the child's background or medical condition was withheld from or misrepresented to them.